

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1**

In the Matter of:	)	Docket No. SDWA 01-2012-0021
	)	
Massachusetts National Guard	)	
	)	
	)	CONSENT AGREEMENT
	)	AND FINAL ORDER
	)	
	)	
Respondent.	)	
	)	

**CONSENT AGREEMENT AND FINAL ORDER**

1. The United States Environmental Protection Agency ("EPA") issues this Consent Agreement and Final Order ("CAFO") to the Massachusetts National Guard ("Respondent") under Section 1431(b) of the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. § 300i(b), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. Complainant is the Director, Office of Environmental Stewardship, United States Environmental Protection Agency, Region 1, and is delegated to issue this CAFO by National Delegation 9-62 and Regional Delegation 9-62.

2. EPA and Respondent agree that settlement of this matter is in the public interest, and that entry of this CAFO without litigation is the most appropriate means of resolving this matter.

3. Therefore, before taking any testimony, without adjudication of any issue of fact or law, and upon consent and agreement of the parties, it is hereby ordered and adjudged as follows:

## **I. STATUTORY AND REGULATORY BACKGROUND**

4. Under Section 1431(a) of the Act, 42 U.S.C. § 300i(a), the Administrator of EPA, upon receipt of information that a contaminant which is present in or is likely to enter an underground source of drinking water, which may present an imminent and substantial endangerment to the health of persons, and that appropriate state and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons.

5. Under Section 1431(b) of the Act, 42 U.S.C. § 300i(b), the Debt Collection Improvement Act ("DCIA"), 31 U.S.C. § 3701, and EPA's Civil Monetary Penalty Inflation Adjustment Rules, promulgated thereunder at 40 C.F.R. Part 19, EPA may assess a civil administrative penalty of up to \$16,500 per day for each violation of the SDWA.

## **II. PRELIMINARY STATEMENT**

6. The provisions of this CAFO shall apply to and be binding on EPA and on Respondent, its officers, directors, successors and assigns.

7. Respondent admits that EPA has jurisdiction over the subject matter alleged in this CAFO. Respondent waives any defenses it might have as to jurisdiction and venue. Respondent consents to the terms of this CAFO, including but not limited to the assessment of a civil penalty, to the issuance of any specified compliance or corrective action order, and to any conditions specified in this CAFO.

8. Respondent neither admits nor denies the specific factual and legal allegations contained in this CAFO. For purposes of this CAFO and any action necessary to enforce it, Respondent hereby waives its right to request a judicial or administrative hearing or otherwise to contest the allegations in this CAFO, other than as specified in Paragraphs 70-74 (Dispute Resolution). Respondent waives any right to appeal this CAFO.

### **III. EPA FINDINGS**

9. Respondent includes two principal divisions: the Massachusetts Army National Guard ("MAARNG"), and the Massachusetts Air National Guard.

10. The MAARNG is Respondent's land force.

11. The MAARNG is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution.

12. The MAARNG is organized, armed, and equipped partly at Federal expense.

13. The MAARNG is part of the Army National Guard as defined by 10 U.S.C. § 101(c)(2).

14. The MAARNG is federally recognized within the meaning of 10 U.S.C. § 101(c)(2)(D).

15. The MAARNG is a "person" within the meaning of Section 1401(12) of the Act, 42 U.S.C. § 300f(12).

#### **The Order Banning Firing of Lead Ammunition**

16. On February 27, 1997, pursuant to Section 1431(a) of the Act, 42 U.S.C. § 300i(a), EPA issued Administrative Order SDWA I-97-1019 ("AO1") to the National Guard Bureau.

17. On April 10, 1997, pursuant to Section 1431(a) of the Act, 42 U.S.C. § 300i(a), EPA issued Administrative Order SDWA I-97-1030 ("AO2") to Respondent and also to the National Guard Bureau.

18. Following the initial signature of AO2 on April 10, 1997, EPA gave Respondent the opportunity to confer with EPA on the issuance of the order.

19. On May 16, 1997, the EPA Deputy Administrator upheld the issuance of AO2, directing EPA Region 1 to make certain modifications, and directed that the order, as modified, become effective on May 19, 1997.

20. Paragraph 2 of AO2 provides: "In the interests of environmental protection, public health and welfare, EPA hereby orders Respondents to undertake all actions required by this Order."

21. Paragraph 5 of AO2 provides: "This Order compels the Respondents National Guard Bureau and Massachusetts National Guard to implement pollution prevention measures to abate the threat to public health presented by the past and present contamination from the Massachusetts Military Reservation (MMR) Training Range and Impact Area. The required actions are described more fully in the attached Scope of Work (SOW) appended to this Order as Appendix A, which is enforceable hereunder."

22. Paragraph 77 of AO2 provides that "[t]he actions required by this Order are necessary to prevent further release or threat of release of contaminants and to protect the health of persons who are or may be users of the Sagamore Lens of the Cape Cod Aquifer. Based on the endangerment described above, the response actions in this Order are necessary. The response actions will consist of Respondents' implementation of the Scope of Work appended to this Order. The Scope of Work is designed to prevent, minimize, and/or mitigate damage to the health of persons which may otherwise result from the release or threat of release of contaminants."

23. Paragraph 78 of AO2 provides: "Based on EPA's jurisdiction, Findings of Fact, [and] Conclusions of Law set forth above, the Administrative Record supporting issuance of this Order, and in order to abate or prevent any imminent and substantial endangerment to health,

the Respondents are ORDERED to perform all Work required under this Order. The Respondents shall comply with the following provisions and perform all actions required by the terms and conditions of this Order.”

24. Paragraph 86 of AO2 provides: “Immediately after EPA approval of Respondents’ retention of the supervising contractor, unless modified pursuant to Section XXXIV of this Order, Modification of the SOW, the Respondents shall commence the work detailed in the Scope of Work. All work performed by the Respondents shall be conducted in accordance with . . . the provisions of this Order including any standards, specifications, and time schedules contained in the Scope of Work or specified by [EPA’s Technical Project Coordinator].”

25. Paragraph 93 of AO2 provides in relevant part: “The Scope of Work and all other appendices or attachments to this Order shall be deemed incorporated into, and made an enforceable part of, this Order.”

26. Paragraph II of Appendix A of AO2 (“Scope of Work”) provides in relevant part: “Respondents shall perform the following Work: A. Respondents shall implement the following pollution prevention measures at or near the Training Range and Impact Area: 1. During the performance of the study of the Training Range and Impact Area being performed by the National Guard Bureau pursuant to the February 27, 1997 Order, and following completion of such study until EPA approves in writing the resumption of activities, except as provided in Section XXXIV of the Order, Modification of the SOW, Respondents shall suspend the following activities: a. All firing of lead ammunition or other ‘live’ ammunition at small arms ranges at or near the Training Range and Impact Area.”

### **Respondent's Petition to Modify AO2**

27. Paragraph 125 of AO2 provides in relevant part: "If a Respondent believes that a modification of the Work specified in the SOW or in work plans developed pursuant to the SOW is necessary and appropriate, Respondent may petition to EPA for an EPA determination on such potential modification, submitting appropriate documentation. Within a reasonable time after receipt of such petition, EPA will make a determination whether the SOW should be modified."

28. On June 13, 2007, Respondent, on behalf of itself and the National Guard Bureau, submitted to EPA a petition to modify the Scope of Work to AO2. Specifically, Respondent requested approval to resume firing with lead ammunition at T (Tango) Range, a small arms range on MMR.

29. Respondent's petition included, *inter alia*, a proposed operational plan entitled *T Range Best Management Practices: Operations, Maintenance, and Monitoring Plan* (T Range OMMP) prepared by URS Corporation for Respondent, and dated June 8, 2007.

#### **EPA's Limited Authorization for Lead Ammunition Training ("LALAT")**

30. After conducting a public comment period on Respondent's petition and considering oral and written comments submitted by members of the public, on July 23, 2007, EPA issued its response to the petition by letter to Respondent from EPA Region 1's Regional Administrator.

31. EPA's July 23, 2007 letter concluded, *inter alia*, that "a limited pilot project for resumption of training with lead ammunition is appropriate" but that "pollution prevention measures are necessary to ensure that the resumption of training with lead ammunition will not result in groundwater contamination."

32. EPA's July 23, 2007 letter concluded, *inter alia*, that "[t]he measures identified in the *T Range Best Management Practices: Operations, Maintenance, and Monitoring Plan*, if performed as described, would be likely to accomplish the following: . . . minimize the amount of lead and other small arms-related contaminants that may migrate into the environment through the use of a STAPP Environmental Bullet Catcher which will capture the majority of bullets fired on the range . . . confirm that the environment is protected from releases of hazardous materials . . . [and] ensure that the capture system is properly maintained and functioning as designed, and . . . assure the system is inspected and operated in accordance with all requirements."

33. EPA's July 23, 2007 response also included a new Appendix B, entitled "Limited Authorization for Lead Ammunition Training" ("LALAT"), which allowed Respondent to conduct lead ammunition training at T Range as a pilot project for one training season from August 1, 2007 to December 31, 2008, subject to conditions. Specifically, the July 23, 2007 response modified Paragraph II.A.1.a of the Scope of Work to AO2 to read: "All firing of lead ammunition or other "live" ammunition at small arms ranges at or near the Training Range and Impact Area except as provided in Appendix B."

34. Paragraph II.C of Appendix B to AO2 provides in relevant part: "[D]uring the pilot period, Respondents and persons operating under their supervision may fire lead ammunition at T Range, subject to the following conditions: 1. Respondents must fully perform the activities described in the *T Range Best Management Practices: Operations, Maintenance, and Monitoring Plan*, which is hereby incorporated by reference . . . ."

35. Paragraph II.D of Appendix B to AO2 provides: “The conditions of Paragraph II.C are fully enforceable requirements of the Order and violations of any of the above conditions may be subject to penalties under the Order.”

**EPA’s Revised Limited Authorization for Lead Ammunition Training (“RLALAT”)**

36. On January 28, 2009, upon request by Respondent, EPA again modified AO2 by adding Appendix C, entitled “Revised Limited Authorization for Lead Ammunition Training” (“RLALAT”). RLALAT allowed Respondent to conduct lead ammunition training on T (Tango), J (Juliet), and K (Kilo) Ranges, through December 31, 2009, subject to conditions. Specifically, these conditions included adherence to the provisions of: 1) the T Range OMMP (dated January 23, 2009); 2) the J and K Range OMMPs (dated January 23, 2009); and 3) the AO2, including Appendix A (Scope of Work) and Appendix B (LALAT).

37. On January 12, 2010, EPA by letter extended the RLALAT through December 31, 2010, and added one additional interim deadline.

38. On January 14, 2011, EPA by letter again extended the RLALAT through December 31, 2011, and added three additional interim deadlines.

39. Both the January 12, 2010 and the January 14, 2011 extension letters provided that “[t]he conditions for operation of Juliet, Kilo, and Tango Ranges shall remain in accordance with the 28 January 2009 EPA approval letter and Appendix C to . . . AO2.”

40. On May 3, 2011, EPA by letter alleged that Respondent violated AO2 by failing to comply with the soil, groundwater, bullet containment system, and reporting requirements of the OMMPs of the respective ranges. By the same May 3, 2011 letter, pursuant to Paragraphs II.B.4 and II.G. of Appendix C, EPA modified Appendix C to incorporate additional requirements and to shorten the duration of the RLALAT to June 30, 2011. EPA’s May 3, 2011

letter also explained that EPA considered "...MANG's failure to inform EPA of its ongoing noncompliance with the approved OMMPs, to be serious."

41. On June 27, 2011, EPA extended the RLALAT duration through December 31, 2011.

42. Subsequent to the May 3, 2011 letter, and the extension of the RLALAT, EPA identified additional violations, as described in Paragraphs 43 to 44 immediately below.

43. EPA identified that MANG had failed to remove and dispose of contaminated water that accumulated in the STAPP Bullet Capture System in accordance with the approved plans:

a. The T Range OMMP requires that "Camp Edwards will sample, collect, and properly dispose of the liquid that accumulates in the corrugated plastic reservoir within the T Range STAPP system after 15 cm of rain ... or after 15 or more cm of water accumulates in the reservoir. Water removal from the internal reservoir will be scheduled to occur within 72 hours, weather permitting." Water was not collected and disposed of at T Range within 72 hours after 15 or more cm of water was measured in the reservoir on May 12, 2011, and including the following additional dates when 15 or more cm of water was measured in the reservoir: June 23, 2011, July 12, 2011, and August 17, 2011;

b. The J Range OMMP requires that "Camp Edwards will sample, collect, and properly dispose of the liquid that accumulates in the corrugated plastic reservoir within the J Range STAPP system after 15 cm of water accumulates in the reservoir. Water removal from the internal reservoir will be scheduled to occur within 72 hours, weather permitting." Water was not collected and disposed of at J Range within 72 hours after 15 or more cm of water was measured in the reservoir on July 14, 2011;

c. The K Range OMMP requires that "Camp Edwards will sample, collect, and properly dispose of the liquid that accumulates in the corrugated plastic reservoir within the K Range

STAPP system after 15 cm of water accumulates in the reservoir. Water removal from the internal reservoir will be scheduled to occur within 72 hours, weather permitting.” Water was not collected and disposed of at K Range within 72 hours after 15 or more cm of water was measured in the reservoir on May 12, 2011, and including the following additional dates when 15 cm or more of water was measured in the reservoir: June 14, 2011, July 13, 2011, and August 12, 2011.

44. EPA identified that MANG had failed to notify EPA that water accumulated in the STAPP Bullet Capture System was not removed in accordance with approved plans, as follows:

a. In its May 3, 2011 letter, EPA required that “In the event that the MANG determines or anticipates that it may not be able to comply with any requirement (including sampling, reporting, range management, and ll other requirements) of the approved plans, the MANG shall within 24 hours of this determination notify EPA in writing, and within an additional 48 hours, submit a plan for EPA approval for addressing the potential deviation from the approved plan.” MANG did not notify EPA within 24 hours of determining or anticipating that it might not be able to comply with the requirement to collect and dispose of water from the reservoirs at J, K and T Ranges, as follows:

- i. For T Range, after measuring an exceedance of the action level on May 12, 2011, June 23, 2011, July 12, 2011, and August 17, 2011;
- ii. For J Range, after measuring an exceedance of the action level on July 14, 2011; and

iii. For K Range, after measuring an exceedance of the action level on May 12, 2011, June 14, 2011, July 13, 2011, and August 12, 2011.

b. In its May 3, 2011 letter, EPA also required that, “[b]y the 10<sup>th</sup> day of every month, MANG shall submit a monthly report that: ... 4) describes all actions scheduled for the next six weeks and provide other information relating to the progress of the work under the Order, including information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the work, and a description of effort made to mitigate those delays or anticipated delays.” The monthly reports submitted by MANG in July, August and September did not contain any information regarding delays encountered by MANG and any efforts made to mitigate those delays.

45. Accordingly, EPA alleges that by failing to comply with the OMMPs of the respective ranges, Respondent violated an administrative order issued pursuant to Section 1431(a) of the Act, 42 U.S.C. § 300i(a).

46. Under Section 1431(b) of the Act, 42 U.S.C. § 300i(b), any person who violates or fails or refuses to comply with an administrative order shall be liable for a civil penalty of up to \$16,500 per day for each violation.

#### **IV. CONSENT AGREEMENT**

47. Based upon the foregoing, and pursuant to Section 1431(b) of the Act, 42 U.S.C. § 300i(b), and the Consolidated Rules of Practice, it is hereby agreed by and between the parties, and Respondent voluntarily and knowingly agrees, as follows:

##### **A. Supplemental Environmental Project**

48. Respondent shall continue to comply with AO2, as modified, and any other EPA directives related to AO2, at all times.

49. Respondent shall complete the following SEP, as described in Attachment 1, which the parties agree is intended to secure significant environmental benefits. The SEP consists of impervious surface removal at MMR, described in Attachment 1.

50. The total expenditure for the SEP shall not be less than \$103,125. Respondent shall include documentation of the expenditures made in connection with the SEP, cumulatively through the date so indicated in the submittal of the SEP Completion Report, as part of the SEP Completion Report.

51. **Implementation.** Within 90 days of the effective date (the date of filing with the Regional Hearing Clerk) of this CAFO, Respondent shall commence implementation of the Attachment 1 measures, and shall thereafter implement the measures for a period of 9 months. With respect to implementation of the Attachment 1 measures, Respondent shall submit quarterly reports to EPA pursuant to Paragraph 52.

52. **Quarterly Reports.** Respondent shall submit quarterly written reports outlining work completed to date and funds spent to date. The quarterly reports will include copies of invoices documenting funds spent towards completion of the SEP. The reports shall be submitted to EPA by the 30th day of the month following each quarter (January, April, July, October).

53. **SEP Completion Report.** Respondent shall provide EPA with a letter indicating the actual date when the SEP is considered complete. Respondent shall then submit a SEP Completion Report within two months after the date of completion of the SEP. The SEP Completion Report shall contain the following information: (i) a detailed description of the SEP

as implemented; (ii) list of itemized costs for implementing the SEP; (iii) a certification by Respondent that the SEP has been fully implemented pursuant to the provisions of this CAFO; (iv) a description of any SEP operating problems encountered and the solutions thereto; and (v) a description of the environmental and public health benefits resulting from implementation of the SEP.

54. Respondent agrees that failure to submit the reports required by Paragraphs 52 and 53 shall be deemed a violation of this CAFO, and Respondent shall become liable for stipulated penalties pursuant to Paragraph 58.

55. Respondent shall submit all notices, submissions, and reports required by this CAFO to Lynne Jennings by First Class mail or any other commercial delivery service at the following address:

Lynne Jennings  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (OSRR07-3)  
Boston, MA 02109-3912

56. For each requirement of this CAFO, including Attachment 1, Respondent shall maintain legible copies of the documentation and data used for any and all documents or reports submitted to EPA pursuant to this CAFO until such time that EPA accepts the SEP Completion Report, as provided in Paragraph 53. Respondent shall provide the documentation and data to EPA within 14 days of a request for such information. In all Attachment 1-related documents or reports submitted to EPA pursuant to this CAFO, Respondent shall, by one of its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the

information submitted. Based on my inquiry of the person or persons who manage the system, the information is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

57. After receipt of the SEP Completion Report described in Paragraph 53, EPA will notify Respondent in writing that: (i) EPA concludes that the SEP has been completed satisfactorily; (ii) EPA has determined that the project has not been completed satisfactorily and is specifying a reasonable schedule for correction of the SEP or the SEP Completion Report; or (iii) EPA has determined that the SEP does not comply with the terms of this CAFO and is seeking stipulated penalties in accordance with Paragraph 58 . If EPA notifies Respondent pursuant to clause (ii) above that the SEP itself or the SEP Completion Report does not comply with the requirements of this CAFO, Respondent shall make such corrections to the SEP and/or modify the SEP Completion Report in accordance with the schedule specified by EPA. If EPA notifies Respondent pursuant to clause (iii) above that the SEP itself does not comply with the requirements of this CAFO, Respondent shall pay stipulated penalties to EPA in accordance with Paragraph 58.

**58. Stipulated Penalties.** (i) In the event that Respondent fails to complete the SEP in accordance with the terms of this CAFO, Respondent shall be liable for a stipulated penalty of \$120,000 unless Respondent demonstrates, and EPA agrees, that Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 90 percent of the amount of money that was required to be spent was expended on the SEP, in which case Respondent shall not be liable for any stipulated penalty. (ii) In the event that Respondent fails to submit the Quarterly Reports required by Paragraph 52, or fails to submit the SEP Completion Report required by Paragraph 53, Respondent shall pay a stipulated

penalty in the amount of \$250 for each day after the Quarterly Report or SEP Completion Report was originally due until the date that the report is submitted. (iii) The determination of whether the SEP has been satisfactorily completed and whether Respondent has made good faith, timely efforts to implement the SEP shall be in the sole discretion of EPA. (iv) Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity. (v) If the SEP is satisfactorily completed, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States equal to the amount resulting from the following calculation: The amount set forth in Paragraph 50 above, less the amounts actually expended by Respondent as documented pursuant to Paragraphs 52 and 53 above. (vi) If the SEP is satisfactorily completed, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty. (vii) Respondent shall pay stipulated penalties not more than twenty-one (21) days after receipt of written demand by EPA for such penalties. The method of payment shall be in accordance with the provisions of Paragraphs 66.b and 66.c. Interest and late charges shall be paid as provided in Paragraph 67.

59. Respondent certifies that, as of the date of this Consent Agreement, Respondent is not required to perform the SEP by any federal, state or local law or regulation, nor is Respondent required to perform the SEP under any grant or agreement with any governmental or private entity, as injunctive relief in this or any other case, or in compliance with state or local requirements. Respondent further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

60. Respondent agrees that EPA may inspect its facilities at any time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

61. Respondent shall operate the SEP for a period as described in Attachment 1 to this CAFO. Respondent may seek an extension of time for initiating or performing an activity under the SEP in accordance with the Force Majeure provisions of Attachment 2, incorporated herein by reference.

62. Anti-Deficiency Act – It is the anticipation of the Parties to this CAFO that all obligations of MAARNG arising under this CAFO will be fully funded. MAARNG agrees to seek sufficient funding to fulfill its obligations under this Order. However, any requirement for the payment or obligation of funds by MAARNG established by the terms of this CAFO shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

63. Respondent agrees that any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the Safe Drinking Water Act.”

64. With respect to any injunctive relief or SEP under the terms of this CAFO:

- a. this CAFO shall not be construed to constitute EPA approval of any equipment or technology installed by Respondent; and

b. Respondent agrees to indemnify, save and hold harmless the EPA, its officials, agents, contractors, subcontractors, employees and representatives, from any and all claims or causes of action: 1) arising from, or on account of, acts or omissions of Respondent, Respondent's officers, directors, employees, agents, contractors, subcontractors, receivers, trustees, successors or assigns; and 2) for damages or reimbursement arising from, or on account of, any contract, agreement, or arrangement between Respondent and any persons or entities for performance of work.

#### **B. Civil Administrative Penalty**

65. Based on Section 1431(b) of the Act, 42 U.S.C. § 300i(b), Respondent's agreement to perform a Supplemental Environmental Project ("SEP"), and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of twenty-seven thousand, five hundred dollars (\$27,500) plus interest if due pursuant to Paragraph 67.

66. The parties have agreed to a settlement on the following terms:

- a. Respondent shall pay the civil penalty set forth in Paragraph 65 no later than 30 calendar days after the final date of this CAFO.
- b. Respondent shall make payment by depositing in the United States mail a cashier's or certified check, or a check issued in the ordinary course of business conducted by Respondent, payable to the order of "Treasurer, United States of America" and referencing the title and docket number of the action ("In the Matter of Massachusetts National Guard, Docket No. SDWA 01-2012-0021"), in the amount of \$27,500 to:

U. S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

The date said check is deposited in the mail shall be considered the date that the payment is made.

Or, Respondent may make payment by electronic funds transfer via:

Federal Reserve Bank of New York  
ABA: 021030004  
Account Number: 68010727  
SWIFT address: FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

c. Respondent shall simultaneously submit copies of the penalty payment check or electronic funds transfer to:

Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (ORA18-1)  
Boston, MA 02109-3912

and

Tim Conway  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (OES04-3)  
Boston, MA 02109-3912

67. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid within thirty (30) calendar days of the entry of the CAFO. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b)(2), promulgated under 31 U.S.C. § 3717. A charge will be assessed to cover the costs of debt

collection, including processing and handling costs and attorneys' fees in accordance with 31 C.F.R. § 901.9(c). In addition, a penalty charge of six percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due in accordance with 31 C.F.R. § 901.9(d). Should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due.

### **C. Retention of Rights**

68. This CAFO constitutes a settlement by EPA of all claims against Respondent for civil penalties pursuant to Section 1431(a) of the Act, 42 U.S.C. § 300i(a), for the violations alleged in Section III of this CAFO. Compliance with this CAFO shall not be a defense to any other actions subsequently commenced pursuant to Federal laws and regulations administered by EPA for matters not addressed in this CAFO, and it is the responsibility of Respondent to comply with all applicable provisions of federal, state, or local law. EPA reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to address imminent hazards.

### **D. General Provisions**

69. All submissions required by this CAFO shall be sent to:

If by Respondent:

James T. Owens III, Director  
Office of Site Remediation and Restoration  
U.S. Environmental Protection Agency, Region 1  
5 Post Office Square, Suite 100 (OSRR07-5)  
Boston, MA 02109-3912  
Attention: Lynne Jennings

If by EPA:

Colonel Richard V. Crivello  
Commander  
Army National Guard Training Site

**E. Dispute Resolution**

70. The dispute resolution procedures of Paragraphs 70-74 shall be the exclusive mechanism to resolve disputes arising under or with respect to Attachment 1 of this CAFO, including stipulated penalties relating to Attachment 1. However, such procedures shall not apply to actions by EPA to enforce obligations of Respondent that have not been disputed in accordance with these procedures.

**71. Informal Dispute Resolution.** Any dispute subject to dispute resolution under this CAFO shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Respondent provides written notice to EPA describing the nature of the dispute and requesting informal negotiations to resolve it. The period of informal negotiations shall not exceed twenty (20) days beyond the date that EPA receives Respondent's written notice unless EPA and Respondent agree in writing to a longer period. If the parties cannot resolve a dispute by informal negotiations, then the position advanced by EPA shall be considered binding unless, within fifteen (15) days after the conclusion of the informal negotiation period, Respondent invokes formal dispute resolution procedures as set forth below.

**72. Formal Dispute Resolution.** Respondent shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by providing written notice to EPA containing a statement of position regarding the matter in dispute. The statement of position shall include, but may not be limited to, any factual data, analysis, or opinion supporting Respondent's position and any supporting documentation relied upon by Respondent. Following receipt of Respondent's statement of position submitted pursuant to this Paragraph, EPA will serve on Respondent its statement of position. EPA's statement of

position shall include, but may not be limited to, any factual data, analysis, or opinion supporting EPA's position and any supporting documentation relied upon by EPA.

73. Following receipt of the statements of position submitted by Respondent and EPA pursuant to Paragraph 72, the Director of the Office of Site Remediation and Restoration ("OSRR Director"), EPA Region 1, will issue a determination resolving the dispute. The determination of the OSRR Director shall be final. The parties to this CAFO each reserve any rights they may have under applicable law with respect to any appeal from the determination of the OSRR Director.

74. The invocation of dispute resolution procedures under this CAFO shall not extend, postpone, or affect any obligation of Respondent under this CAFO not directly in dispute, unless the final resolution of the dispute so dictates. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of nonperformance, but payment shall be stayed pending resolution of the dispute as provided in this CAFO. If Respondent does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Paragraph 58 above.

#### **F. Attorneys' Fees and Costs**

75. Each party shall bear its own costs and fees in this proceeding, including attorneys fees, and specifically waives any right to recover such costs from the other party pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, or other applicable law.

#### **G. Authorization and Binding Effect**

76. Each party certifies that at least one of its undersigned representatives is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind such party to this document.

77. The provisions of the Consent Agreement shall be binding upon Respondent, its officers, directors, agents, servants, authorized representatives and successors or assigns.

**In the Matter of Massachusetts National Guard     Docket No. SDWA 01-2012-0021**  
**Consent Agreement and Final Order**

FOR MASSACHUSETTS NATIONAL GUARD:

A handwritten signature in black ink, appearing to read "L. Scott Rice", is written over a horizontal line.

L. SCOTT RICE  
Major General, MA NG  
The Adjutant General (Acting)  
Date: 16 August 2012

**In the Matter of Massachusetts National Guard     Docket No. SDWA 01-2012-0021**  
**Consent Agreement and Final Order**

FOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Susan Studlien                      08/28/12  
Susan Studlien, Director                      Date  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency, Region 1

Timothy M. Conway                      08/29/2012  
Timothy M. Conway                      Date  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency, Region 1

**FINAL ORDER**

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is hereby ordered to comply with the terms of the above Consent Agreement, which will become effective on the date it is filed with the Regional Hearing Clerk.

U.S. ENVIRONMENTAL PROTECTION AGENCY

  
\_\_\_\_\_  
LeAnn Jensen, Acting Regional Judicial Officer  
U.S. Environmental Protection Agency, Region 1

  
\_\_\_\_\_  
Date

**Attachment 1 to Docket No. SDWA 01-2012-0021**

**Supplemental Environmental Project:  
Impervious Surface Removal  
Camp Edwards and Otis Air National Guard Base**

Respondent, the Massachusetts National Guard, hereby agrees to undertake the following Supplemental Environmental Project (“SEP”) in connection with the settlement of the enforcement action described in this CAFO.

**A. Background Information**

Respondent operates a portion of the Massachusetts Military Reservation (“MMR”) facility on Cape Cod, Massachusetts (“Facility”). Respondent has identified approximately 14 acres of asphalt at the Facility that can be removed to reduce grassland bird habitat fragmentation and improve groundwater quality. The impervious surfaces that Respondent will remove, consistent with Section C below, are identified in Figure 1.

**B. Environmental Issues**

The presence of impervious surfaces at the Facility reduces overall groundwater quality, including limiting stormwater absorption capacity and groundwater recharge and allowing the flow of pollutants in stormwater in impacted areas. The impervious surfaces also fragment habitat for grassland bird species. The MMR facility area contains habitat for a number of endangered, threatened species, or species of special concern under Massachusetts law, including the upland sandpiper (*Bartramia longicauda* – endangered), the grasshopper sparrow (*Ammodramus savannarum* – special concern), the vesper sparrow (*Pooecetes gramineus* – threatened), and the northern harrier (*Circus cyaneus* – threatened). The Massachusetts Department of Fish and Game, and its Division of Fisheries and Wildlife (“MA DFW”) support

this project. All areas within the grassland management resource area on the MMR are considered Priority and Estimated Rare Species Habitat for wildlife and rare species by the MA DFW Natural Heritage and Endangered Species Program (“NHESP”).

C. **Project**

The SEP consists of the following which Respondent shall complete:

- Respondent shall remove 14 acres of existing impervious surfaces, as specified on Figure 1 to this SOW. After completion of approximately 5 acres of impervious surface removal, Respondent shall schedule a meeting with EPA project staff to review implementation to date, issues encountered, and issues anticipated with the remaining acres of impervious surface removal.
- Respondent shall remove and stockpile reclaimed materials at the site of the proposed UTES facility within MMR. Storage by Respondent of the reclaimed materials shall be in accordance with any applicable laws or regulations related to storage of the excavated asphalt material.
- Following the completion of the project, the areas will be monitored and maintained consistent with the grassland management provisions of the relevant Installation Integrated Natural Resource Management Plan (“INRMP”), whether it be the Camp Edwards INRMP or the 102<sup>nd</sup> IW INRMP.
- Impacts to Massachusetts Endangered Species Act (“MESA”) species and the surrounding habitat, including but not limited to disturbance/stress due to machinery use, movement, and noise, shall be avoided, minimized or mitigated. Prior to initiating work in an area, Respondent shall have an experienced natural resources specialist inspect the work area

and propose measures, if necessary, to ensure that impacts are avoided, minimized or mitigated. The inspections shall continue as necessary throughout the project.

**D. Costs**

Respondent shall spend at least \$103,125 to complete performance of the SEP. Respondent's allowable costs for purposes of the SEP may include labor base pay costs and gasoline, but shall not include base allowance for housing, or costs for use of Respondent's equipment.

**E. Environmental Benefits**

The SEP will increase stormwater absorption capacity, increase groundwater recharge and reduce the flow of pollutants in stormwater in impacted areas at the Facility. In addition, the SEP will also increase the area of non-fragmented habitat for grassland bird species. In particular, the SEP will benefit the following bird species: the upland sandpiper, the grasshopper sparrow, the vesper sparrow, and the northern harrier. Lepidoptera species (moths and butterflies) such as the state threatened pink streak (*faronta rubripennis*) occur and depend on this system for survival.

**F. CAFO Compliance and Reporting**

In performance of the SEP, Respondent shall comply with all requirements of the CAFO, including the SEP reporting requirements.

**G. Schedule**

Within 90 days of the effective date of the CAFO, Respondent, in accordance with the CAFO, shall commence implementation of the SEP measures. Once Respondent commences implementation of the SEP, Respondent shall thereafter continue implementing the SEP measures until complete; Respondent shall not exceed 275 days from commencement to completion of the SEP.

## **Attachment 2: Force Majeure**

A. "Force Majeure" for purposes of this CAFO, is defined as any event arising from causes entirely beyond the control of Respondent, including its contractors and subcontractors, that delays or prevents the timely performance of the SEP under this CAFO notwithstanding Respondent's best efforts to avoid the delay. Force Majeure does not include Respondent's financial inability to perform any action under a SEP.

B. If an event occurs which causes or may cause Respondent to fail to fully comply in a timely manner with any provision of the SEP, Respondent shall provide written notice via electronic mail and overnight mail to EPA within seven (7) days of when Respondent first knew or should have known of the event. In the notice, Respondent shall specifically reference this Force Majeure Attachment 2, and describe the expected length of time the delay or impediment to performance may persist; the known or suspected causes of the delay or impediment; the measures taken or to be taken by Respondent to prevent or minimize the delay or impediment; and the timetable by which those measures will be implemented by Respondent.

C. Failure by Respondent to fully comply with the notice requirements set out in Paragraph B, above, shall render the remainder of this Attachment 2 void and of no effect as to the particular event involved, and shall constitute a waiver of Respondent's rights under this CAFO to obtain an extension of time based on such event.

D. If EPA agrees that Respondent's failure to comply with a provision of the SEP is attributable to Force Majeure, EPA and Respondent shall stipulate in writing to an extension of time for, or to a modification of, the performance of the affected requirements of the SEP, with any extension of time not to exceed the amount of time lost due to the actual unavoidable delay resulting from such circumstances. Stipulated penalties shall not accrue for the number of days

constituting the actual unavoidable delay caused by such circumstances.

# Supplemental Environmental Project Impervious Surface Removal Area Camp Edwards and Otis Air National Guard Base



In the Matter of: Massachusetts National Guard  
Docket No. SDWA-01-2012-0021

**CERTIFICATE OF SERVICE**

I hereby certify that, on the date referenced below, the foregoing Consent and Agreement and Final Order was delivered in the manner stated to the following persons:

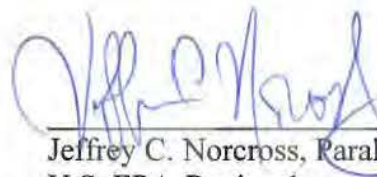
Original and One Copy by  
Hand Delivery:

Wanda Santiago  
Regional Hearing Clerk  
U.S. EPA-Region 1  
5 Post Office Square, Suite 100  
ORA 18-1  
Boston, MA 02109

Copy by Certified Mail,  
Return Receipt Requested:

Colonel Timothy A. Mullen  
Chief Legal Counsel  
Office of the Adjutant General  
Massachusetts National Guard  
50 Maple Street  
Milford, MA 02109

Dated: 8/31/2012



Jeffrey C. Norcross, Paralegal  
U.S. EPA-Region 1  
5 Post Office Square, Suite 100  
OES 04-4  
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